No. 2604.

United States
Circuit Court of Appeals
For the Ninth Circuit

RUDOLPH SCHULTZ,
Plaintiff in Error.

vs.

STACK-GIBBS LUMBER COMPANY,
Defendant in Error.

} At Law

Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Idaho, Northern Division.

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STATEMENT OF THE CASE.

This is an action brought to recover damages for the breaches of two logging contracts, entered into contemporaneously between the same parties, at Kootenai County, Idaho. The complaint contained two causes of action, the two contracts being attached to and made a part of the same, and the breaches were stated separately.

The defendant in error, defendant below, first interposed a motion to strike certain portions of the complaint as being incompetent, irrelevant, immaterial, redundant, sham and frivolous matters and things, which motion was granted by the Court as to

four paragraphs of the first cause of action, as appears from the Bill of Exceptions herein.

Thereafter defendant in error demurred to the entire complaint and the demurrer was sustained. The plaintiff in error electing to stand on his complaint, judgment of dismissal and for costs was entered. The cause comes here on writ of error.

The first cause of action recites that on or about October 15th, 1912, the defendant was the owner of certain lands in Shoshone County, Idaho, having grown thereon large quantities of merchantable white and yellow pine timber and a large quantity of mixed and other varieties or tree; that the defendant was then and ever since has been engaged in operating a saw-mill for the purpose of manufacturing logs into lumber and wood products; that the plaintiff had been, for a long time, engaged in logging timber and was experienced and skilled therein; that on or about said October 15, 1912, the plaintiff and defendant entered into a contract in writing, a copy of which, marked Exhibit "A", was attached to the complaint, whereby the defendant contracted with the plaintiff for the cutting and removal of all the merchantable white and yellow pine timber, standing, growing, and being upon said lands and providing that said white and yellow pine timber should be cut and removed from said lands on or before June 1st, 1914; that upon the execution and delivery of said contract, made in duplicate, the plaintiff entered upon the performance of his part of the same and employed a large number of men to assist therein, purchased and leased

the right of way for the necessary roads and skidways, at a cash outlay of more than $1,100.00, purchased and furnished teams and invested a large amount of money, to-wit: More than $700.00 in camp equipage, tools and supplies, and expended the sum of $225.00 for labor, and by December 15, 1912, had fully cut and placed upon skids 250,000 feet of white and yellow pine and in addition thereto felled 100,000 feet of similar timber ready to place upon skids, and in every way complied with the conditions of said contract upon his part; that under the terms of said contract it was provided that on the 15th day of each month for all white pine and yellow pine logs, the plaintiff was to place or caused to be placed on skids for transportation, the defendant was to pay plaintiff the sum of $3.25 for each 1000 feet of logs, board measure, placed upon said skids and that in accordance with said contract the plaintiff had fully cut and placed upon said skids 250,000 feet of white and yellow pine as aforesaid and that then and there it became and was the duty of the defendant to pay plaintiff the sum of $3.25 per 1000 feet of logs, board measure, placed upon said skids and that in accordance with said contract the plaintiff had fully cut and placed upon said skids 250,000 feet of white and yellow pine as aforesaid, and that then and there it became and was the duty of the defendant to pay plaintiff the sum of $3.25 per 1000 feet, the said logs having been scaled as required by said contract and amounting in the aggregate to the sum of $812.50; that at the time of the making of said contract, Ex-

hibit "A", the plaintiff had to his credit in bank the sum of $700.00, his total cash capital, of which fact he informed the defendant; that he, further, then and there informed the defendant that he owned a homestead in said County which he could and would incumber for as large amount as he could by his best endeavors obtain, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition; that among other things the said contract provided and required that the plaintiff should furnish the right of way over which to haul the logs from said lands; *that on or about the said October 15, 1912, the plaintiff had expended for right of way for said road the sum of $200.00, more than $1100.00 to construct said road and to fit the same for the purpose of hauling said logs to water,* and had, in addition, expended for supplies and rent of buildings more than $700.00; that he had mortgaged his said homestead for as large amount as he could obtain, and that the expenditures made in and about the said business by plaintiff and required to be made under the said contract, he had exhausted all of his resources; that on said last mentioned date, the same being due under said contract, the plaintiff requested the defendant to pay him the sum of $812.50 for the logs already placed upon the skids as aforesaid, which said sum or any other sum the defendant refused and neglected to pay, and that upon four different other times plaintiff had demanded from defendant payment of said sum and the defendant neglect-

ed and refused to pay said amount or any portion thereof to plaintiff for his said services and carrying out his part of said contract; that the plaintiff, then and there, to-wit: at the time of the first refusal and the subsequent refusals to pay, had expended all the cash money which the said plaintiff had, had mortgaged his homestead, to enable him to carry out his part of said contract, had exhausted all of his resources and was utterly unable to obtain money or further credit from any source whatever, and that, unless the defendant paid him the amount aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant, and the defendant was fully cognizant of the same; that because of the refusal to pay him, the plaintiff, the amount of money so due him, the payment of which would have enabled him readily to proceed with his contract and to carry out his part of the same, the defendant having refused to pay him the same, the plaintiff was unable to complete his part of the said contract and to go on with the same, and because of the acts of the defendant aforesaid, the plaintiff was obliged to suspend all efforts to carry out his part of said contract and to abandon the same; that there was growing upon the said lands hereinbefore described 3,500,000 feet of yellow pine and 1,500,000 feet of white pine, all of which would have been cut, felled and transported by plaintiff, in accordance with his part of said contract, if the defendant had not repudiated its obligations to pay to plaintiff for his work and labor the

amount, on the time and in the manner provided by said contract, and the plaintiff not been prevented from carrying out said contract by the acts of the defendant; that had the plaintiff been permitted to carry out his part of said contract he would have had a profit thereon of the sum of $1.00 per 1000 feet, board measure, of the aggregate of said timber, to-wit: five million feet; and that by reason of the default of the defendant and its repudiation of its said contract, Exhibit "A", the plaintiff had been damaged in the sum of $5000.00, which he would have realized as profits upon his said contract, the sum of $700.00 expended by him for supplies and rent of building, the sum of $200.00 expended by him for right of way, *$1100.00 expended by him for making said road way,* and $255.00 expended by him for labor, all of which was lost to him by reason of the said acts of defendant.

The plaintiff prayed judgment against the defendant, on said first cause of action, for the sum of $7255.00 and his costs.

In stating his second cause of action, the plaintiff adopted paragraphs 1, 2 and 3 of his first cause of action and made the same a part thereof.

The plaintiff further alleged that on October 15, 1912, in consideration of the plaintiff having entered into the contract, Exhibit "A", the defendant entered into a contract with plaintiff in writing, whereby the defendant agreed to sell to plaintiff and the plaintiff agreed to purchase from defendant, all timber growing up the lands described in the first cause of action

other than the merchantable white and yellow pine growing, situate and being thereon, to-wit: All mixed white fir, red fir, tamarack, spruce, black pine and cedar timber, at and for the price and sum of 50c per 1000 feet, the plaintiff to have four years to cut and remove the same, a copy of which contract, marked Exhibit "B", was attached to and made a part of the said complaint, the said contract Exhibit "A" being specially referred to in said Exhibit "B"; *that the said contract Exhibit "B" was dependent upon and in its carrying out was to follow the completion of the contract Exhibit "A",* and that by reason of the repudiation and default of the defendant described in paragraphs 4, 5, 6 and 7, stated in said first cause of action to which reference was had, and the same was made a part of his statement of his second cause of action, the plaintiff was prevented from carrying out his part of the contract described in Exhibit "B" attached to his complaint, and he was obliged, because of the said acts of the defendant, to abandon the same; that there was growing, standing and situate upon the said lands 3,500,000 feet of mixed timber, referred to and made the subject of the contract of Exhibit "B"; that if the defendant had kept its several obligations, entered into with the plaintiff and had not repudiated and been in default in the carrying out of its said contracts, the plaintiff, in the performance of his part of said contract, Exhibit "B", would have made a profit of 75c per 1000 feet, board measure, of said mixed timber, to-wit: an aggregate profit of $2625.00,

and by reasons of the acts, repudiations and default of the defendant, the plaintiff had been damaged in the said sum. Upon his second cause of action the plaintiff prayed judgment in the sum of $2625.00 and his costs, making an aggregate judgment of $9880.00 upon both causes of action.

After the motion to strike portions of the complaint setting out the first cause of action, the defendant interposed a special demurrer to both causes of action upon, substantially the following grounds:

1. That it does not appear from the complaint that the logs in question were scaled as provided in the contract and that the clause in the contract providing for scaling the logs cut is a condition precedent.

2. That it does not appear from the complaint that the plaintiff furnised defendant with receipts showing the payment of all labor and supplies connected with said logging operation.

3. That it does not appear from the complaint that plaintiff acquired and constructed the roads referred to in contract.

4. That recovery of special damages is erroneously sought.

5. That two causes of action are improperly united.

6. Sufficiency of complaint in pleading the second cause of action.

SPECIFICATION OF ERRORS.

First. For that the Court erred in its order and judgment of June 4th, A. D. 1914, in striking from the first cause of action, set forth in the plaintiff's complaint, the following paragraphs therein contained, to-wit:

Commencing with the word "that," being the first word in paragraph 6 of said first cause of action, and continuing down to and including the words "financial condition," being at the insertion of the second semicolon in said paragraph, and being the following matter, to-wit:

"That at the time of the making of the said contract with the defendant, "Exhibit A", the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone, which he could and would incumber for as large amount as he could by his best endeavors obtain, and that these two items constituted his entire and obtainable assets, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition."

Also that part thereof commencing with the word "that" on the fourth semicolon in said paragraph 6, on page 4 of said complaint, and continuing down

to and including the words "all his resources" in said paragraph, being the following matter, to-wit:

"That he had mortgaged his said homestead for as large amount as he was able to obtain and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources."

Also the following matter in said paragraph 6, commencing with the word "and" immediately following the last semicolon in said paragraph, and continuing down to and including all of the balance of said paragraph, being the following matter, to-wit

"And that the plaintiff, then and there, to-wit: at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had, that he had mortgaged his homestead to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same."

Also, all of paragraph 7, as follows, to-wit:

"That because of the refusal of the defendant to pay him, the plaintiff, the amount of money so due him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his con-

tract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same."

Second. The Court erred in holding and deciding that the portions of the complaint set out in said first assignment of error was incompetent, irrelevant, immaterial, redundant, sham and frivolous and therefore subject to be stricken.

Third. The Court erred in sustaining the motion of the defendant to strike from said complaint the paragraphs set out in said first assignment of error.

Fourth. The Court erred in sustaining the demurrer of the defendant herein, to plaintiff's first cause of action, in holding and deciding that the provision in the contract, Exhibit "A", upon which said first cause of action was based, which provided that the plaintiff should build roads from the skidways to the banking ground on Pine Creek, so that the logs could be hauled to Pine Creek without additional expense, was a condition precedent to the maturity of the obligation to make the first payment, provided for in said contract, Exhibit "A".

Fifth. The Court erred in sustaining the demurrer of the defendant to the first cause of action of the complaint of the plaintiff.

Sixth. The Court erred in holding and deciding that the second cause of action set forth in the com-

plaint of the plaintiff herein did not state facts sufficient to constitute a cause of action against the defendant.

Seventh. The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

Eighth. The Court rendered judgment against this plaintiff whereas judgment ought to have been rendered in favor of the plaintiff, and against the defendant.

ARGUMENT.

The theory of the right of recovery by the plaintiff in error was so completely denied by the emasculation of his complaint in granting the motion to strike, as set forth in the bill of exceptions, that any probable result, thereafter, appeared to be negligible. Hence, while the expense of the record was within his possible reach, he has brought his contention here.

In framing the complaint and alleging the damages, the case of Skagit Railway and Lumber Company vs. Cole, 2 Wash. 57, and cases there cited, were closely followed. If the rule there announced is the correct one, the motion, here, to strike, should have been denied; if this Court shall disagree with those cases and announce the contrary doctrine, then the plaintiff in error is, virtually, without any remedy.

The Washington case, above referred to, was brought to recover damages in the sum of $7575.00 for an alleged breach of contract entered into between the

appellant and appellee, by which the appellant let to the appellee, for a certain term of years, mentioned in the contract, certain lands therein described, and, in consideration of the sum of $1.50 per thousand feet of stumpage, sold and gave him license to cut saw logs, piles and spars upon said lands during such time; and further agreed to furnish to said appellee at the reasonable market price all the provisions and logging supplies needed by him during the continuance of said contract. The appellee claimed that he entered upon the performance of his part of the contract, and employed a large number of teams, and invested a large amount of money in camp equipage, tools, etc., and in every respect fulfilled all the conditions of the contract on his part, but that during the months of July and August and the first part of September, 1888, the appellant refused to furnish him logging supplies and provisions, as provided in the contract, and that in consequence of such failure the appellee made 13 trips from his logging camp to the place of business of the appellant at an expense of $195.00 for the purpose of procuring such supplies, but in consequence of the appellant's failure to furnish them, these trips were made useless; and claimed further that, during this period, in consequence of appellant's failure to furnish such supplies, the business of the appellee was interrupted and his teams compelled to remain idle, to his damage in the sum of $450.00. The appellee claimed further that the appellant failed and refused to supply him with provisions and logging appliances, as provided in said contract from

the 12th day of September, 1888, for a period of six weeks continuously, and in consequence of such failure the appellee was unable to carry on his business and was compelled to shut down his camp and suspend his business for a period of six weeks, causing him damage to the amount of $2000.00. He claimed further that on the 5th day of June, 1889, at the most advantageous time for logging, the appellant again refused to supply him with provisions and logging appliances as provided in the contract, and notified him it would no longer comply with the terms of its contract, and has ever since failed and refused to do so, and in consequence of such failure, the men employed by the appellee abandoned their labors in the camp, and the appellee was unable to procure supplies or subsistence, or to maintain or operate his business to the extent of his ability, and, in place of 45,000 feet of saw logs per day, which he had been putting into the market, he was only able to put in 20,000 feet per day, causing him damage to the extent of $3000.00.

Mr. Justice Scott, in rendering the opinion of the Court uses the following language upon the questions analogous to those involved here:

"As to the inadmissibility of the evidence objected to under the pleadings, while the complaint did not contain a direct allegation that appellant knew the appellee was unable to procure supplies elsewhere, it did contain the following statement: 'That, at the time of purchasing said timber from the said defendant as aforesaid, plaintiff, for want of sufficient means, was unable to employ and pay a requisite

number of men and to purchase the extra number of teams and tools necessary for plaintiff to have to enter upon said described premises and to make logging roads thereon so as to transport said timber to market, and to purchase a sufficient supply of goods, wares, and merchandise to enable plaintiff to carry on so extensive a logging business and remove said timber from said described premises during the limited period aforesaid; and in order to induce the said plaintiff to purchase said timber from the said defendant, and to induce the said plaintiff to remove the said timber from the said premises aforesaid within the respective periods of time aforesaid and in consideration of the said plaintiff's purchasing said timber and agreeing to remove the same within the time aforesaid, the said defendant then and there contracted and agreed to and with the said plaintiff to furnish plaintiff with the means with which to employ and pay men, purchase teams, tools, etc., to properly conduct and carry on said business, and to sell, furnish, and deliver to said plaintiff all the provisions and logging supplies needed by said plaintiff upon credit.' There was testimony also to show that the parties had transacted business with each other before entering into this contract, and appellant's vice-president testified that at the time the contract was made appellant knew Cole had no money, and that it would have to back him in the enterprise, and knew he could not get along without such assistance. From all the circumstances connected with this mat-

ter we are satisfied appellant did not sustain any injury therein.

"As to the basis upon which appellee was entitled to recover damages, a long list of authorities was presented by each party, which it is difficult, if not impossible, to harmonize. The position taken by appellee and sanctioned by the superior court is sustained by a number of cases very similar to this one. If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew when it ceased furnishing the same that the result would be to compel appellee to abandon the enterprise, or seriously to embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act, and to be answerable in damages therefor. Nor do we think the damages too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which the logs, spars, and piles could be manufactured; and, at the time of the breaches, there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself when gotten out was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof. Indeed, some of the cases go to a much

greater extent than it is necessary to go in this case to sustain the rule of damages adopted at the trial. Of the authorities presented upon the question of damages we cite the following as supporting this case: Shepard v. Gas-Light Co., 15 Wis. 349; Booth v. Rolling-Mill Co., 60 N. Y. 487; Richardons v. Chynoweth, 26 Wis. 455; Crescent Manuf'g. Co. v. N. O. Nelson Manuf'g. Co., 100 Mo. 325; Houser v. Pearce, 13 Kan. 104; Benj. Sales, 870; 1 Suth. Dam., pp. 75, 90, 91, 106-116."

In the case of Graham vs. McCoy et al., 17 Wash. 63, the Washington Supreme Court cites Skagit Railway and Lumber Co. vs. Cole, *supra*, as an authority and reaffirms the principles of that case. In point of facts, this case is almost a counterpart of the case at bar and the law issues were the same as here.

Mr. Justice Reavis, in his opinion, among other matters, uses the following language:

"If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew, when it ceased furnishing the same, that the result would be to compel appellee to abandon the enterprise, or to seriously embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act, and to be answerable in damages therefor. Nor do we think the damage too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which

the logs, spars, and piles could be manufactured; and, at the time of the breaches, there was the benefit of past experience, the known results of previous efforts in carrying on the work, from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself, when gotten out, was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof." We think the better-considered authorities elsewhere maintain this rule for the measurement of damages, and sustain its application in the case at bar."

The leading case is again cited with approval by the Washington Supreme Court in Fedaral Iron & Brass Bed Co. vs. Hock, 42 Wash. 668, and the following observation by Mr. Justice Root is extremely pertinent here:

"The action of the trial court in striking the affirmative answer and counterclaim, and in sustaining the demurrer is assigned as error, as is also the denying of appellant's motion for a new trial. We think these rulings of the trial court were erroneous. It is doubtless true that prospective profits are ofttimes speculative, indefinite, and imaginary, but here there is a reasonable certainty as to some future profits. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all merely speculative and conjectural or of a character incapable of legal ascertainment. Ofttimes in the breach of a contract of this character the only damages sustained are those of future profits. These

may be of a substantial character in contemplation of law, and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions, may be deemed to have been reasonably certain had the breach not occurred. In the case of Wakeman v. Wheeler and Wilson Mfg. Co., 101 N. Y. 205, the Court of Appeals of New York said: 'Most contracts are entered into with the view to future profits, and such profits are in contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rule of damages, to determine the compensation to be awarded for the breach.' See also Lumber Co. v. Cole, 2 Wash. 57; Shepard v. Gaslight Co., 15 Wis. 349; Goldhammer v. Dyer, 7 Colo. App. 29."

The leading case is again cited and followed in Goldhammer vs. Dyer, 7 Colo. App. 29.

Plaintiff leased a boarding house from defendant, the latter agreeing to furnish her groceries on monthly credit, she having given a chattel mortgage on fur-

niture of her own to pay for other furniture to secure payment of rents.

After possession and entering the business, defendants refused to extend the agreed credit and foreclosed the mortgage, thus stopping and ruining plaintiff's business; she brought suit for profits and a recovery was sustained.

Generally, as to the breach of contract, damages, and recovery of profits, we refer the Court to paragraphs 4, 5 and 6 of the syllabus in the case of Anvil Mining Co. vs. Humble et al., 153 U. S. 540, stated as follows:

"4. Profits may be recovered as damages for breach of a contract for mining ore where they are not uncertain or remote, and were obviously within the intent and mutual understanding of both parties when the contract was made.

"5. Whenever one party to a contract prevents the other party from going on with it, the other party is at liberty to treat the contract as broken and abandon it, and recover as damages the profits which he would have received through full performance.

"6. When a contract is not performed the party who is guilty of the first breach is generally the one upon whom rests all the liability for the non-performance."

It is clear that the demurrer to the first count, upon the ground that the same insufficiently alleges performance of conditions precedent, is not well taken. The complaint, in addition to specifically alleging performance of such conditions, states in paragraph 4 that the plaintiff

> "in every respect complied with the conditions of the said contract upon his part."

By express provision of the Idaho Laws such plea is all that is required. Section 4212 of the Idaho Code of Civil Procedure provides:

> In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance.

It is therefore earnestly contended that the performance of all conditions precedent is clearly and amply alleged in the complaint and that the demurrer should accordingly have been overruled.

ARGUMENT AS TO DEMURRER.

(a) The provisions of the contract upon which the first three grounds of the demurrer are based are referred to by defendant as conditions precedent.

Condition precedent is defined in 8 Cyc. 558 as a condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect.

Says the Iowa Supreme Court: "We cannot accede to the doctrine that the provisions under consideration are conditions precedent; a condition precedent, as applied to the contract, is a condition which must be performed before the agreement of the parties becomes a valid contract," citing Redman vs. Insurance Co., 49 Wis. 431; Jones vs. U. S. Mut. A. A., 61 N. W. 487.

However, the complaint avers, paragraph 5, page 3, that the logs, in the payment for which the defendant has defaulted, had been scaled as required by the contract. In paragraph 4, last two lines, it is averred that the plaintiff had complied with the conditions of his contract in every respect.

All of the matters set forth in the first three grounds of the demurrer are matters of defense, pure and simple, and are not required to be specially pleaded by the plaintiff. And, generally, the complaint comes squarely within the decisions of this State.

Where a complaint states the ultimate facts, etc., and is sufficiently specific to enable answer, it is sufficient.

Carscallen vs. Coeur d'Alene & Co., 15 Idaho 444-450.

McLean vs. City of Lewiston, 8 Idaho 472.

Implications and presumptions of law need not be pleaded.

Bates vs. Capital State Bk., 18 Idaho 429.

The construction of a pleading is to be such as a fair and reasonable intendment may imply.

McCormick vs. Smith, 23 Ida. 487.

And there should be a liberal construction with a view to substantial justice.

Same vs. Same.

"It is true that the complaint is not as specific as some pleaders would have made it, but we think the ultimate facts therein stated constitute a cause of action. In this class of cases the pleader must state all facts necessary to inform the defendant of all acts or omissions that are charged against the defendant, so as to enable him to make a full and complete defense thereto. It is an established rule of pleading that probative facts need not be pleaded."

McLean vs. City of Lewiston, 8 Idaho 482.

Carscallen vs. Coeur d'Alene Co., 15 Idaho 450.

Under the provisions of our Code, the technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out

of court only when upon his facts he is entitled to no relief either at law or in equity.

Rauh vs. Oliver, 10 Idaho 9.

Elliott vs. Collins, 6 Idaho 266.

Implications of law arising from the facts stated, need not be pleaded and presumptions of law need not be averred.

Bates vs. Capital State Bk., 18 Idaho 435.

(The above action was one of claim and delivery and it was objected that the complaint did not show the plaintiff entitled to immediate possession—a condition precedent, etc.)

Sec. 4207 Rev. Codes provides for a liberal construction of pleadings with a view to substantial justice between the parties. It does not appear that the defendant has been misled because of the clerical errors in those dates. A pleading should be construed so as to allege all of the facts that can be implied by fair and reasonable intendment from the facts stated.

McCormich vs. Smith, 23 Idaho 493.

The Revised Codes of Idaho provide as follows:

"Sec. 4207. In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties."

(b) The objections raised to the recovery of special damages, go to the measure of damages, and are hardly the subject of demurrer. The Court will take care of that branch of the case in instructing the jury.

The right of plaintiff to recover for money expended on the roads would seem to be clear; he owned the right of way and the roads. When the contract was completed, he would still own them, could sell them, or use them for other operations, and his property would remain in them. Because of the defendant's conduct in bankrupting him, the plaintiff lost his property.

(c) The two causes of action are not improperly united under the laws of Idaho. Both are express contracts in writing, made contemporaneously, between the same parties. Exhibit "B" refers expressly to Exhibit "A", and it appears clearly from the two documents that the former was to succeed and follow the latter and they are complements of each other.

The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied.

* * * *

Chap. 23, Laws of 1913, page 92.

Seven classes of causes of action may be united under this statute. In the case at bar, the two causes stated both belong to Class 1; they affect all the parties to the action; they do not require separate places of trial; and they are separately stated.

CONCLUSION.

I.

Motion to Strike.

The breach of the contract complained of was the failure of the defendant in error, to make the payment of $812.50 due on November 15, 1912, by reason of which, because the plaintiff in error had exhausted his financial means and credit, his status being well known to the defendant in error, the abandonment of the contract was forced. If the act of the defendant in error was a breach of the contract, then, certainly, a cause of action exists. By this act, and persistence in the same, the plaintiff in error was prevented from carrying out the contract on his part. The defendant in error had been fully advised, in advance, of the exact financial position of the plaintiff in error and it knew that the latter had just barely sufficient means to reach to the time when the first payment would mature. And this must have been in contemplation of the parties when the contract was made.

It is said in Taylor vs. Bradley, 39 N. Y. 129, that the only rule which will do justice to the parties is that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure. What was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, submit to labor and appropriation

of his stock. His damages are what he lost by being deprived of his chance of profit.

On a trial, the plaintiff in error would have been required to show why he did not go on with the contract. His reason was that he was financially unable to do so, because of a situation of which the defendant was fully informed. He must justify the recession of the entire two contracts. If it was incumbent upon him to sustain these matters by evidence, he must allege them in his pleadings that the adversary may have notice.

II.

Demurrer.

The Court below sustained the demurrer to the first cause of action upon the sole ground that there was no direct allegation that the plaintiff had built roads from the skidways to the banking ground on Pine Creek.

Paragraph 4 of the first cause of action, beginning in the second line, recites that "the plaintiff entered upon the performance of his part of the same and employed a large number of men, secured by purchase and lease the right of way for the necessary roads and skidway at a cash outlay of more than eleven hundred dollars, * * * and in every respect complied with the conditions of the said contract upon his part."

It is recited in paragraph 6 of the complaint, immediately following the first paragraph stricken, as follows:

" * * * that among other things the said contract provided and required that the plaintiff should furnish all right of way over which to haul the logs to be cut from the said lands at his own expense; that on or about the said November 15, A. D. 1912, the plaintiff had expended for right of way for said road the sum of two hundred dollars and more than eleven hundred dollars for building and constructing such road and to fit the same for the purpose of hauling the logs to water."

This provision was, undoubtedly, overlooked by the Court below, as the greater portion of paragraph 6 had been stricken, a very easy and natural oversight.

Besides, the failure of the plaintiff in error, to actually construct these roads would be matter of defense and not such an omission in pleading as could properly be reached by demurrer.

The Court below sustained the demurrer to the second cause of action upon the ground that it did not appear that the two contracts, Exhibits "A" and "B", were interdependent—that one could not be performed without also performing the other. We submit that this was a misconstruction of these contracts.

Under the terms of the first contract, Exhibit "A", it was to be fully performed on or before June 1st, 1914.

The contract, Exhibit "B", recites in its second paragraph that its consideration is the making of the first contract, Exhibit "A".

The timber referred to in both contracts stood

and grew, indiscriminately, upon the same lands. The plaintiff in error was to have four years to remove this mixed timber. The fourth paragraph of Exhibit "B" provided as follows:

"Party of the second part agrees to cut and remove all of said mixed timber on or before four years from the date hereof and to pile the brush resulting from said cutting as the work progresses and to burn said brush each year, the piling and burning said brush to conform to the State Fire Law as enforced by the Fire Warden appointed by the State."

The time of performance and the requirement of the burning of the brush each year under the State Fire Law negative any presumption that the two contracts were to be performed together. The brush could not be burned until the white and yellow pine were removed. However, all doubt upon this subject is removed by a reading of the last paragraph of Exhibit "B", which is as follows:

"First party agrees to fully warrant title and quiet possession to second party against any and all persons lawfully claiming or to claim the whole or any part thereof upon the completion of said contract bearing even date herewith and the payment of fifty-cents per 1000 feet, board measure, and the piling and burning of brush as herein provided."

And it appears, by necessary implication, that in performing his part of the contract, Exhibit "B", the plaintiff in error would require to use the same roads and skidways as he provided under the contract, Exhibit "A". Deprived, as fully appears from the

statement of the second cause of action, in his complaint, of the use and possession of these auxiliaries, he could not carry out his part of the second contract.

Paragraph 3 of the second cause of action recites that the contract, Exhibit "B", was dependent upon and in its carrying out was to follow the completion of the contract, Exhibit "A".

It is respectfully submitted that the judgments, both as to the motion to strike and the demurrer, should be reversed and the cause directed to be proceeded with as required by law.

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